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# Supreme Court of the United States

**October Term, 1944.**

**No. 945.**

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JAMES NEGRO,

*Petitioner,*

*vs.*

BOSTON AND MAINE RAILROAD,

*Respondent.*

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## BRIEF OPPOSING WRIT OF CERTIORARI.

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1945

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## BRIEF OPPOSING WRIT OF CERTIORARI.

### Statement of Facts.

Although there was no conflict in the evidence, some facts, in addition to those contained in the petition for certiorari, should be stated.

The surface of the platform, 15 feet 5 inches in width (R. 74) and about 800 feet in length (R. 73) with a roof supported by a line of 50 posts in the center (R. 76, 79), was originally macadam (R. 72). Due to the softening of this material in hot weather, permitting wheels of the hand-trucks to sink in, a wood plank flooring was laid in 1929 (R. 72). In order to make the loaded hand-trucks run easier (R. 73), 2 steel strips each 10 inches in width (R. 74) and about 11 inches apart (R. 75) were fastened to the plank flooring with counter-sunk screws (R. 76). They extended lengthwise over the platform, the one on the outside being 15 1/2 inches from the outer edge of the platform (R. 74) and the one on the inside 3 feet 3 inches from the line of posts (R. 75). The distance from the outer edge of the platform to the post line was 7 feet 2 inches (R. 75) and the total width of the platform 15 feet 5 inches (R. 74) (Photos. R. 148,

150). The hand-trucks (Photos. R. 152, 154) are about 5 feet in length (R. 84) and about 20 to 24 inches in width (R. 83), permitting one wheel to run on each strip and the employee to walk on the wood flooring between. This facilitated the handling of loaded trucks and made them run easier (R. 73).

There are no rules or regulations where the men are to move with these hand-trucks (R. 82) and they go in all directions (R. 82, 43, 66), sometimes on one side of the platform and sometimes on the other, turning in and out as the occasion requires (R. 81). Usually a man with an empty truck will turn out of the way of a loaded truck (R. 63). When a loaded truck is being moved *along* the platform, it is supposed to be pulled instead of pushed (R. 89), but when loaded trucks are being brought out of a car they are sometimes pushed out and at other times pulled, depending upon the kind of load, how it is placed in the car (R. 95, 98), whether it is necessary to make a turn and how other material and freight may be placed in the car (R. 111).

Petitioner had been employed as a freight handler since some time in May, 1943 (R. 59). On July 1st he started work at 7:00 A. M. with other employees and had moved some freight from one car to another (R. 59). About a half hour after the day's work started (R. 59) he was on his way back for another load, pushing his *empty* truck (R. 45) along the left side of the platform (R. 61). About 2 or 3 feet to his left (R. 58) stood a line of freight cars along the platform, each with an open door, and to his right was the line of posts in the center of the platform (R. 61).

He was walking on one of the steel runways (R. 60), not on the planking in the space between them, when suddenly a loaded truck came out of one of the cars on

his left about 7 or 8 feet in front of him (R. 58). He stopped to avoid a collision, his feet slipped on the steel runway, he fell backward and his truck fell upon him, breaking his right leg (R. 45-46, 62).

## I.

**The Court of Appeals, in affirming the judgment dismissing the complaint "on the ground that there was no proof of any negligence causing the injury" (R. 172) (293 N. Y. 791), correctly decided the case.**

1. *In so doing it has followed the rule recently reiterated by this Court.*

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."
>
> *Brady v. Southern Ry. Co.*, 320 U. S. 476, 479-480.

2. *There was no proof to sustain a finding of negligence.*

a. *Size of platform.*

Its width had nothing to do with the accident. Ample space was provided for petitioner to choose where to walk with his empty truck. That 80 men worked there daily, moving their trucks in various directions, is sufficient refutation of such contention, if any is needed.

b. *The steel runways.*

Existing in the same location for nearly 15 years (R. 72-73) and installed for the purpose of making loaded trucks run easier (R. 73), they were not defective. Naturally they were smooth (R. 45, 88), for the very purpose of their installation required it. If, as petitioner testified, he was walking upon one of the steel strips (R. 60-61), and he must have been to have slipped on it, the wheels of his truck would have been astride the strip, whereas they were intended for the wheels to run on. Sufficient space existed between the strips upon which to walk (R. 75). The Trial Court, without objection of petitioner, charged that no negligence could be based upon the installation and maintenance of the steel runways (R. 145).

The measure of the employer's duty was reasonable care only and not that of an insurer.

*Tiller v. Atlantic Coast Line R. R.*, 318 U. S. 54, 67.
*Missouri Pacific Railroad Co. v. Aeby*, 275 U. S. 426.
*Delaware, &c., R. R. v. Koske*, 279 U. S. 7.

Eighty men working 300 days a year for 15 years at this location would account for 360,000 man-days, which multiplied by the number of times each moved to-and-fro daily along this platform, gives some indication of its extensive use and reasonable safety.

c. *"Traffic" rules.*

The work was not of a complicated nature and was such that the men were required to move in various directions and look out for themselves. The work was free from complexities and simple in character. No rules are required to direct such commonplace work.

*McGivern v. Northern Pacific Ry.*, 132 Fed. 2d 213, 219.

d. *There was no negligence of any fellow employee.*

Failure to look, if there was such, did not cause the accident. It would be highly unreasonable to require an employee, before bringing a loaded truck out of a car door, to go to the door and look up and down the platform to see if anyone was approaching. By the time he had done so and returned for his load many employees might approach in different directions. Looking, under such circumstances, would have been to no avail. Nor would a signal or warning. With 18 freight cars along each side (R. 75), a signal each time one of the 80 employees emerged from a car with a loaded truck would only have resulted in utter confusion.

There was no collision. Petitioner was subjected to no more danger than he would have been had another employee walked out of the car in front of him, instead of a loaded truck suddenly appearing. He was endeavoring to avoid walking into an object (R. 62), the nature of which was entirely immaterial.

Nor was there violation of any rule. The supposed rule applied only to the movement of a loaded truck *along* the platform (R. 98). When, however, loaded trucks are brought out of a car they are pushed at times and at other times pulled, depending upon the kind of load, how it is placed in the car (R. 95, 98), whether it is necessary to make a turn and how other freight may be placed in the car (R. 111). Hence, such rule did not apply to a truck coming out of a car onto the platform (R. 96, 98, 110-111). "They come out of the car both ways" (R. 98). There would have been the same necessity to stop whether the truck or the man first emerged

from the door. This accident was caused solely by the fortuitous circumstance that petitioner, while walking on one of the steel strips, came to a sudden halt causing his feet to go out from under him, and not by reason of any negligence on the part of the respondent.

## II.

### No substantial federal question is presented.

1. Affirmance by the Court of Appeals without opinion does not signify anything beyond approval of the result in the court below.

> *Rogers v. Decker*, 131 N. Y. 490, 493.
> *People ex rel. Palmer v. Travis*, 223 N. Y. 150, 156.
> *Matter of Clark*, 275 N. Y. 1, 4.

2. Moreover, its decision does not purport to rest upon assumption of risk but "on the ground that there was no proof of any negligence causing the injury" (R. 172). The fact that the intermediate Appellate Court discussed assumption of risk in its opinion is comparable to the situation in *Beamer v. Virginia Ry.*, 181 Va. 650; 26 S. E. 2nd 43, where the Trial Court dismissed the complaint because of assumption of risk in a case arising since the 1939 Amendment, but the highest Court of Virginia affirmed upon the basis of no negligence and this Court denied certiorari (321 U. S. 763).

3. No construction or interpretation of the Federal Employers' Liability Act is involved, but merely the question presented in any negligence action, of whether there is any proof to submit to a jury. Such a case, involving no matter of public importance, no question of statutory or constitutional interpretation, no conflict with any other decision of this or any other Court, no important question of law, does not justify a review by this Court. Petitioner has been afforded a hearing in three State Courts. To

grant a fourth under the circumstances here involved is unwarranted.

*Bailey v. Central Vermont Ry.*, 319 U. S. 350, 354, *et seq.*

4. There is no conflict with any decision of this Court. The Court of Appeals has followed the long standing rule of this and all other Courts, that before a case can be submitted to a jury there is always the preliminary question for the Court whether, viewing the facts most favorably to the plaintiff, a recovery is justified.

*Coughran v. Bigelow*, 164 U. S. 301, 307.
*Penna. R. R. v. Chamberlain*, 288 U. S. 333, 343.
*Brady v. So. Ry. Co.*, 320 U. S. 476, 479-480.

5. To follow that rule, as the Court of Appeals has done here, does not deprive petitioner of a jury trial, because a jury trial connotes trial before the Court as well as the jury. Any other rule would constitute abdication of the function of the judge and make him a mere umpire, powerless to prevent "the mischance of speculation over legally unfounded claims" (*Brady v. So. Ry. Co., supra*, 320 U. S. 476, 480).

## III.

## The petition should be denied.

All of which is respectfully submitted.

Dated: March 1, 1945.

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